No. 06-722

Supreme Court, U.S.
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In The Supreme Court of the United States

FUJI KOGYO CO., LTD.,

Petitioner,

v.

PACIFIC BAY INTERNATIONAL, INC.; BATSON ENTERPRISES, INC.; AMTAK LIMITED,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The United States

BRIEF IN OPPOSITION

*HUGH F. BANGASSER, ESQ.
THERESA L. KEYES, ESQ.
KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
(206) 623-7580

Attorneys for Respondent Pacific Bay International, Inc.

*MARK J. PATTERSON, ESQ.
EMILY A. SHOUSE, ESQ.
WADDEY & PATTERSON
1600 Division Street, Suite 500
Nashville, Tennessee 37203
(615) 242-2400

Attorneys for Respondent Batson Enterprises, Inc.

*KENT E. KRAUSE, ESQ.
BREWER, KRAUSE, BROOKS, CHASTAIN & BURROW
P. O. Box 23890
Nashville, Tennessee 37202
(206) 623-7580

Attorneys for Respondent Amtak Limited

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

This is a product configuration trade dress case correctly decided after a fact-intensive inquiry related to the functionality of the fishing line guide leg designs at issue. In accord with federal appellate and United States Supreme Court precedent, the district court weighed the totality of the evidence presented at trial. It concluded that the curved leg designs were primarily functional and, thus, any alleged trade dress rights were unenforceable. The United States Court of Appeals for the Sixth Circuit properly reviewed for clear error that totality of the evidence of functionality, and affirmed.

None of Petitioner's Questions Presented is raised by the decisions below. The issues in this case involve only questions of evidence and factual findings, and are particular only to these parties. Petitioner's Questions Presented were not preserved, and a plain reading of the opinions below dispels Petitioner's mischaracterization of those opinions and its efforts to create fictional legal issues. Notwithstanding Petitioner's Questions Presented, Petitioner's arguments seek a re-weighing of the evidence that is precluded by the "clear error" standard of review. This Court should not exercise its discretionary review because the issues in this case do not warrant it. With that caveat, Respondent reframes the Question Presented as follows:

1. Whether a conflict of authority has been created as a result of the Sixth Circuit's affirmance after a review for clear error of the district court's finding of functionality based on the totality of the evidence?

RULE 24(1)(b) AND 29.6 STATEMENTS

The caption contains the names of all parties that appeared in the Sixth Circuit. *Pacific Bay International, Inc.* has no parent company nor does any publicly held company own 10% or more of its stock. *Batson Enterprises, Inc.* has no parent company nor does any publicly held company own 10% or more of its stock. *Amtak Limited* has no parent company nor does any publicly held company own 10% or more of its stock.

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STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinions below, and provide the following concise recitation of facts relevant to the Court's consideration of whether to grant certiorari of Petitioner's Questions Presented. Additionally, the Petition included misstatements which Respondents will address throughout this Opposition.

There are four fishing line guide designs at issue in this case to which Petitioner claims product configuration trade dress rights. The alleged trade dress relates only to the curved legs of the fishing line guides, as opposed to the entire guide. Petitioner obtained federal trademark registrations for the leg designs of its model "LV", "SV", and "N" line guides. Petitioner claims common law trademark rights in the leg design of its model "LR" line guide.

Petitioner filed suit against Respondents[1] asserting trade dress infringement related to the supporting legs of Petitioner's LV, SV, N, and LR model fishing line guides. Respondents denied that any of the disputed leg shapes functioned as indicators of source, denied there was any likelihood of confusion, asserted numerous affirmative defenses, and counterclaimed for a declaration that the four designs were functional. As a remedy, Respondents asked the district court to find the alleged trade dress to be unenforceable, and to cancel the three federal trademark registrations.

The district court entered judgment in favor of the Respondents by finding that Petitioner did not own trade

[1] Respondents do not manufacture line guides. They are U.S. importers and resellers of the fishing line guides at issue.

dress rights in any of the four disputed curved leg designs because the designs were functional. The Sixth Circuit reviewed for clear error, and affirmed. The district court weighed the totality of the evidence, and made the factual finding of functionality based on the record evidence at trial, which record evidence included (1) statements and admissions of functionality made by Petitioner in its utility patents; (2) statements and admissions of functionality in Petitioner's printed advertising materials; (3) lay witness testimony; (4) party testimony; and (5) expert testimony. (Pet. App. 6-7, 13)

The utility patents were offered into evidence by the Respondents. During pre-trial and at trial, Petitioner never asserted the necessity of a formal patent claim construction as a prerequisite for the district court's consideration of the patents as probative evidence of functionality. Petitioner never argued that any of the utility patent claims needed to be interpreted in the context of the trade dress infringement case. To the contrary, in the litigation, Petitioner strategically and repeatedly avoided squarely addressing the relevance of the utility patents. Yet, in its advertising, Petitioner touted its utility patents as protecting the new, curved "v-shaped" leg design as being an improvement over the Petitioner's prior straight-legged designs. (*See* JA 660, 675, 293, 666)

Regarding lay witness testimony, Petitioner offered no witness in support of its case other than its own employees or agents. Despite the four line guides at issue being designed by the same two individuals, one of whom was Petitioner's former Patent Manager, neither of those witnesses testified at trial. The employees that did testify for Petitioner, by way of pre-filed written testimony, offered the only direct "evidence" of alleged ornamentality

of the line guide leg designs. The district court allowed into evidence, over objection, thirty-year-old conclusory hearsay evidence that the curvature and attachment points of the line guide legs were selected by the designer solely as an aesthetic choice. (Pet. App. 19, 52) This testimony, along with the testimony that during the development phase for the patented leg designs there were no strength or flexibility tests conducted of the four leg designs at issue, constituted the little evidence offered by Petitioner related to ornamentality – all of which the district court admitted.

Finally, the expert testimony presented by the parties primarily focused on whether the curved leg design was *stronger* than prior straight-legged models. (Pet. for Cert. 3, JA 2300, 2327) This is significant. Petitioner expressly acknowledges in its Petition that "Fuji's expert testified that straight legs were stronger than comparable curved legs and, therefore, *more functional*." (Pet. for Cert. 3) Although Respondents disagreed with the finding regarding the comparable strength of the curved leg design versus straight-legged design, nonetheless, Petitioner's own expert provided additional record evidence of the functionality of the line guide legs. As such, it is a misstatement by Petitioner to assert that "[t]he parties contested *whether* the leg designs were functional, *principally* through the testimony of expert witnesses who differed as to whether curved legs or straight legs were stronger." (Pet. for Cert. 3) The record is replete with evidence of functionality, other than expert testimony, including thousands of pages of exhibits, such as catalogs and advertisements of the line guides at issue, consumer testimony, testimony of the parties, statements and admissions set forth in the utility patents, and the line guides themselves.

Based on the record evidence of functionality, the district court ordered that the three federal trademark registrations be cancelled. The Sixth Circuit affirmed the functionality determination, and followed established precedent that "[f]unctionality in a trademark case is a factual determination reviewed only for clear error." (Pet. App. 7) The Sixth Circuit examined the evidence of functionality for clear error – a standard that does not allow for the re-weighing of evidence – and expressly noted that "[e]ven had [we] been sitting as the trier of fact, [and] would have weighed the evidence differently," "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (Pet. App. 20)

The Sixth Circuit reviewed the district court's findings of functionality based on the totality of the record and probative evidence of *de jure* functionality as set forth in *In Re Morton-Norwich Prods., Inc.*, 671 F.2d 1332 (C.C.P.A. 1982). The Sixth Circuit properly concluded that "[t]he opinion of the district court considered various admitted evidence relating to all four of the *Morton-Norwich* factors." (Pet. for Cert. 15) The Sixth Circuit examined the utility patents, advertising materials, availability of functionally equivalent designs, manufacturing processes resulting in a comparatively simple or cheap method to manufacture guides with curved leg designs, testimony of consumer recognition of the functionality of the designs, and evidence of alleged ornamentality. Given the lack of clear error by the district court in finding the line guide leg designs to be functional, the Sixth Circuit properly affirmed.

REASONS FOR DENYING REVIEW

I. THE PETITIONER'S QUESTIONS OF PATENT CLAIM CONSTRUCTION WERE NOT RAISED OR PRESERVED IN THE DISTRICT COURT.

A. Petitioner Never Requested a Formal Claim Construction in the District Court, Thus Failing to Raise This Issue.

"As a general rule, an appellate court will not hear on appeal issues that were not clearly raised in the proceedings below." *Boggs v. West*, 188 F.3d 1335, 1337-38 (Fed. Cir. 1999) (citing *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976), and *quoting Hormel v. Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719 (1941); *see also Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233, 74 S. Ct. 505 (1954) ("Of course, we will not undertake to review what the [trial] court below did not decide.") "This rule ensures that 'parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'" *Boggs*, 188 F.3d at 1337-38.

This Court requires Respondents to bring to its attention questions presented that involve issues considered by the appellate court, but never first raised or decided at the district court. Supreme Court Rule 15.2; *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16, 105 S. Ct. 2427 (1985); *Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197 (1989). Here, Petitioner's Questions Presented 1(a) and 1(b) concern patent claim construction never raised at the district court. If Petitioner believed a formal claim construction was necessary, it was required to request a claim construction earlier than on appeal. *See, e.g., Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1360 (Fed. Cir. 2004) (Defendant waived the

right to request a claim construction because "only after the presentation of all the evidence to the jury did [Petitioner] even suggest that claim construction might be helpful to determine the scope of the claimed invention.")

At trial, Petitioner never asserted that a patent claim construction analysis should be undertaken. Instead, Petitioner side-stepped addressing the claims and other language of the patents by arguing that the patents covered the entire line guide, while this case was limited to a consideration of the appropriateness of trade dress protection for the leg designs. Petitioner never asserted any position at trial as to whether the leg designs were different from or the same as the legs in the expired utility patents. Petitioner instead attempted to focus its argument primarily on the idea that the leg designs were arbitrary and, therefore, ornamental. (JA 2467 at p. 42)

After trial, the district court presented the parties with an outline of issues that it wanted addressed in the proposed findings of fact and conclusions of law to be presented by each party. At no time did the court or any party assert the necessity of a patent claim construction. When the district court tasked the parties with setting forth their proposed findings and conclusions regarding functionality, Petitioner failed to address the utility patents. Conversely, Respondents methodically went through each relevant utility patent, making showings as to the functional attributes of the curved line guide leg designs as probative evidence of their utilitarian advantages.

The Sixth Circuit appropriately recognized that the district court had never been charged with undertaking a patent claim construction. (Pet. App. 24) Because Petitioner

failed to raise and preserve this issue, Petitioner has forfeited this issue as a basis for this Court to accept review.

B. At No Time Did Petitioner Put at Issue Disputed Language in a Claim of a Utility Patent That Might Have Triggered the Need for a Formal Claim Construction.

Not only did Petitioner fail to ask the district court to perform a formal claim construction, Petitioner never identified any dispute as to the meaning of any claim or put forth its own claim construction. Without competing arguments regarding a particular claim of a particular patent needing interpretation and construction, the district court was well within its discretion to read the patents, including the claims, and ascertain the plain meaning of the language as probative of the functionality or alleged ornamentality of the disputed leg designs. *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005).

Further, the United States Court of Appeals for the Federal Circuit has emphasized that if a patent's intrinsic evidence is unambiguous, claim construction and a resulting analysis of what these claims cover "involves little more than the application of the widely accepted meaning of commonly understood words" to the product or device at issue. *Phillips*, 415 F.3d at 1314. A formal claim construction analysis is only required "when the meaning or scope of technical terms and words of art is unclear and in dispute and requires resolution to determine." *United States Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). A finding that a device is covered by the claims of a patent is a question of fact, reviewed only for clear error. *See, e.g., Boss Control, Inc. v. Bombardier, Inc.*, 410 F.3d 1372, 1376 (Fed. Cir. 2005).

The district court was well within its authority to read and apply the language of the intrinsic patent record in evidence (including the claims and specifications of Petitioner's utility patents) to the features of the leg designs at issue. This approach is consistent with several cases (including *TrafFix* itself) examining the relevancy of a utility patent on later-claimed trademark rights, and which cases do not require a separate claim construction analysis. *See, e.g., Marketing Displays v. TrafFix Devices, Inc.*, 967 F. Supp. 953 (E.D. Mich. 1997), *aff'd*, 200 F.3d 929 (6th Cir. 1999), *rev'd*, 532 U.S. 23, 121 S. Ct. 1255 (2001); *Antioch Co. v. Western Trimming Corp.*, 347 F.3d 150 (6th Cir. 2003); *Disc Golf Ass'n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002 (9th Cir. 1998) (employing a "close examination" of utility patents); *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197 (11th Cir. 2004); *Berlin Packaging, LLC v. Stull Technologies, Inc.*, 381 F. Supp. 2d 792 (N.D. Ill. 2005).

Because Petitioner never raised a position as to any particular claim needing construction, on this basis alone this Court should not accept review of Petitioner's Questions related to issues of claim construction.

II. THE DECISION BELOW DOES NOT RAISE EACH OF THE QUESTIONS PRESENTED IN THE PETITION.

A. The Sixth Circuit's Doctrine of Equivalents Analysis of the SV and LV Designs Did Not Improperly "Vitiate" a Claim Limitation.

Question 1(a) as presented by Petitioner suggests that the Sixth Circuit created a conflict with Federal Circuit precedent by holding in this case that the "doctrine of equivalents" may be used to vitiate a limitation in a patent

claim. This question is not raised by the Sixth Circuit decision.

In a patent infringement analysis under the doctrine of equivalents, the operative question is whether the accused product contains "elements identical or equivalent to each claimed element of the patented invention." *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39-40, 117 S. Ct. 1040 (1997). Further, courts must ask whether a claim element which is not literally present in the accused device is present in an element in the accused device which "performs substantially the same function in substantially the same way to obtain the same results." *Eagle Comtronics, Inc. v. Arrow Comm. Labs., Inc.*, 305 F.3d 1303, 1315 (Fed. Cir. 2002).

The Sixth Circuit looked to patent law's doctrine of equivalents in comparing the Petitioner's utility patents to the disputed SV and LV line guide designs, determining that "the SV and LV guides can be seen as equivalents" to the legs in Petitioner's U.S. Patent Number 3,690,027 ('027) and U.S. Patent Number 4,215,504 ('504). (Pet. App. 22-23) In this comparison, the Sixth Circuit did not hold that the doctrine of equivalents may be used to vitiate a claim limitation. Instead, the court specifically acknowledged how the SV and LV designs differed from the patents, and recognized that "as a device to assist the finding of functionality," consideration of the doctrine of equivalents "increases the likelihood of finding" that the designs are functional. (Pet. App. 23)

In a patent infringement case, the doctrine of equivalents is used to determine whether a patent claim is infringed. Here, the Sixth Circuit did not conclude that Petitioner's SV and LV leg designs "infringed" any of Petitioner's own patents. Instead, the Sixth Circuit (following the

lead of the district court below) considered the existence of Petitioner's utility patents as evidence of functionality of Petitioner's alleged trademarked leg designs.

Petitioner has attempted to create an issue for this Court by framing the question as though this case were a patent case. It is not. It is a trade dress case in which utility patents were but a portion of the evidence of functionality. Because this is not a patent infringement case, Petitioner's suggestions of conflicts raised by the Sixth Circuit's opinion in comparison with other courts' interpretations of certain patent law principles are incorrect and unpersuasive.

The Sixth Circuit was not required to consider and apply the doctrine of equivalents in this case in a manner identical to its application in a patent case. The position that Petitioner took in its utility patents, and in this case, is that its utility patents claimed the complete line guides, not just the legs. However, just because the legs are not claimed separately does not mean that they are not probative of functionality. Had Petitioner desired to identify in its utility patents a non-functional feature of its line guides so as to reserve a right to protect that feature under trade dress principles, it could have done so by making such a statement in the patent specification. Petitioner has not identified any such statement in its briefing to the district court, to the Sixth Circuit, or to this Court.

In a patent infringement case, an accused product would need more than just the claimed legs to be "infringing" – it would have to have all the elements of the claim to infringe the patent. In this case, where trade dress protection is claimed for only a *portion* of a product's useful design, it would be illogical to require a complete correspondence between the limitations in a patent claim

for the *entire* product and the *portion* of the product claimed as trade dress. Thus, it was proper for the Sixth Circuit to use the doctrine of equivalents to compare the portion of the product configuration for which trademark protection was claimed by Petitioner (the legs) with the corresponding portion of the invention (the entire line guide) described and claimed by Petitioner in its utility patents.

Moreover, the Sixth Circuit did not, as Question 1(a) suggests, disavow the "All Elements" rule as applied in patent cases. Rather, the Sixth Circuit readily acknowledged that the SV design differed from the '027 patent in the point of attachment and that the LV design was missing a "third leg" as recited in the '027 patent claim. The Sixth Circuit concluded that given the purpose of the line guide disclosed in the '027 patent, the patent was available as a "device to assist the finding of functionality." (Pet. App. 23) The Sixth Circuit did not say that the LV design infringed the '027 patent – it said that "the patent evidence increases the likelihood of finding that the LV design is also functional." (Pet. App. 23) Such an analysis in a trade dress dispute does not conflict with the All Elements rule as applied in patent cases to prevent vitiation of a claim element.

Thus, the Sixth Circuit's analysis of this case did not improperly vitiate a claim element, nor did it raise any question of interpretation or application of the All Elements rule as a patent doctrine.

B. The Sixth Circuit Did Not Hold that Unclaimed Features Shown in Patent Drawings Are Per Se Ineligible for Trademark Protection.

The Sixth Circuit did not limit its analysis by looking only to the drawings of the '027 and '504 patents when

reviewing for clear error the district court's finding of functionality of the leg designs of the N and LR guide.

Question 2 presented by Petitioner asserts that the Sixth Circuit relied only on its subjective view of the drawings, rather than the language of the patents, when reviewing the patent evidence related to the functionality of the N and LR leg designs. (Pet. for Cert. 15) Even a cursory reading of the Sixth Circuit's opinion reveals that Petitioner is simply wrong. After making that assertion, Petitioner then curiously quotes a lengthy section of the court's opinion showing the Sixth Circuit's review of the utility patents went well beyond merely looking to the patent drawings. (*See* Pet. for Cert. 14, *quoting* Pet. App. 9-10)

The Sixth Circuit specifically states in its analysis that it considered the patent disclosures, specifications, preferred embodiment of the inventions, and the disclosure of the method, manner and process outlined in the patents. (Pet. App. 8-9) In fact, the Sixth Circuit quotes 35 U.S.C. § 112 in its analysis and states as follows:

> Importantly, grant of a patent requires *disclosure* of a *specification* that can be copied by future imitators:
>
> > 'The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set for the best mode contemplated by the inventor of carrying out his invention.' 35 U.S.C. § 112.

(Pet. App. 8)

The Sixth Circuit expressly noted that it looked to the patent specifications – and a patent specification by definition includes the text of the patent and not simply the drawings. Although both lower courts included relevant patent drawings in the opinions, there is not a single express reference to the drawings in the Sixth Circuit's analysis that would lead one to conclude that the court relied only on its subjective view of the '027 and '504 drawings as being probative of functionality. To the contrary, the Sixth Circuit noted that "a court may not prevent an individual skilled in the art of line guide manufacture from duplicating the *specification disclosed* in either the '027 or '504 patent and creating guides identical to the N and LR models" once the patents had expired. (Pet. App. 9, *citing* 35 U.S.C. § 112) (emphasis added)

Petitioner's Question Presented 2 is predicated on an obviously false premise about what the Sixth Circuit did, and that question falls woefully short of articulating a basis in law or fact for this Court to grant certiorari.

C. Evidence of the Alleged Ornamentality of the Line Guide Leg Designs Was Considered.

Petitioner asserts that the district court and the Sixth Circuit failed to consider the alleged ornamentality of the line guide leg designs.[2] (Pet. for Cert. 19, 21) Petitioner's

[2] In *TrafFix*, the court recognizes that "where a manufacturer seeks to protect arbitrary, incidental, or ornamental aspects of features of a product found in the patent claims, such as arbitrary curves in the legs . . . the manufacturer could perhaps prove that those aspects do not serve a purpose within the terms of the utility patent." 532 U.S. 23, 34, 121 S. Ct. 1255 (2001).

Question Presented 3 is entirely premised upon a misstatement of fact regarding the evidence of ornamentality that was admitted and considered. Additionally, at no time did Petitioner ever assert as an issue on appeal that the district court committed clear error in its consideration of alleged ornamentality of the leg designs, nor could it.

Petitioner frames the issue as if the courts below did not consider evidence of ornamentality, but then recites verbatim the Sixth Circuit's discussion of the evidence of ornamentality admitted and considered by the district court. (Pet. for Cert. 21, *quoting* Pet. App. 19-20) Petitioner then turns around and ignores its own wrong assertion, and instead argues for a re-weighing of the evidence admitted and considered by the lower courts. Even the Petitioner is unable to frame an argument in support of its own false premise.

Petitioner's evidence of the alleged ornamentality of the leg designs failed to satisfy any burden of proof when weighed against the totality of the record evidence of functionality. Petitioner offered its evidence of ornamentality through two employee witnesses, Mr. Yamamoto and Mr. Goto. The pre-filed written direct testimony of these witnesses constituted the totality of Petitioner's evidence of ornamentality – which evidence was not only scant, but based primarily on thirty-year-old hearsay evidence, admitted over objection, regarding conclusory statements of the inventor's preference.[3] The Sixth Circuit accurately summarized the entire scope of Petitioner's evidence of

[3] Mr. Ohmura, Petitioner's designer of the line guide legs at issue, was never called by Petitioner as a witness at trial, and was never made available for a deposition.

ornamentality, and the district court's weighing of that evidence, as follows:

> The district court weighed the evidence at trial and concluded that the product designs were functional. Fuji attempted to show that its trademarked legs' shape was 'ornamental, incidental, or arbitrary.' Mr. Goto testified for Fuji that the trademarked curves 'were selected based on aesthetics or an ornamental design,' and that 'no calculations were conducted regarding the strength' of the legs. Mr. Yamamoto also opined for Fuji that 'we did not calculate the strength,' the selection criteria was 'Mr. Ohmura's preference.' In contrast, however, Fuji's own marketing materials claimed that its patented designs were light, strong, shock absorbent, and flexible. Given the plain language of *TrafFix*, we cannot say that it was error for the district court to give more weight to the utility patents and Fuji's admissions than to its witnesses, including the experts, on the issue of functionality. The district court's weighing of the evidence is plausible.

(Pet. App. 19-20)

The district court admitted, considered and weighed the plausibility of Petitioner's ornamentality evidence, including the credibility of the witnesses, when making its finding of functionality. In fact, the district court specifically found that "given Fuji's statements in its patent papers that the legs served a functional purpose, with any aesthetics being a byproduct, the Court concludes these facts outweigh the divided expert testimony on the functionality of Fuji's line guides." (Pet. for Cert. 4) Under the clear error standard of review, the Sixth Circuit was precluded from re-weighing that evidence, and appropriately affirmed.

The Sixth Circuit expressly noted "[t]he district court was charged with weighing the evidence in this case and making a determination by a preponderance of the evidence. We cannot say that the court's conclusion was erroneous and certainly not clearly erroneous." (Pet. App. 13)

Petitioner's Question Presented 3 provides no basis in law or fact warranting this Court to exercise its discretionary review.

III. THERE IS NO INTER-CIRCUIT OR SUPREME COURT CONFLICT ON THE QUESTIONS PRESENTED.

Petitioner fails to articulate or identify, beyond a mere passing reference, any alleged conflict with federal appellate or Supreme Court precedent resulting from the Sixth Circuit's Opinion below.[4] Not once does Petitioner set forth with even minimal specificity a legal issue needing resolution by this Court on review related to conflicting or divergent approaches. Petitioner makes conclusory assertions in this regard, but then essentially reargues the evidentiary case below. Petitioner is unable to make any showing that the Sixth Circuit has adopted an approach other than being consistent with reviewing for clear error the totality of evidence of functionality of the disputed trade dress.

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[4] Petitioner refers to the case of *Vornado Air Circulation Systems, Inc. v. Duracraft Corp.*, 58 F.3d 1498 (10th Cir. 1995), in its Summary of the Argument (Pet. for Cert. 6), but then fails to address that case substantively within its Petition for Certiorari.

A. The Sixth Circuit's Consideration of the Doctrine of Equivalents as a Factor in Evaluating Functionality Did Not Create a Conflict with Federal Circuit or Supreme Court Precedent.

The Sixth Circuit did not make any holdings in this trade dress infringement case concerning the proper interpretation of patent claims in a patent infringement case. Petitioner offers only conclusory arguments that the Sixth Circuit has diverged from an existing canon of patent law with respect to the doctrine of equivalents and the All Elements rule. Petitioner has not identified any holding or result established in this case by the Sixth Circuit, or by the district court, where new law is made with respect to claim interpretation in a patent context. It simply did not occur in this case. As such, this case presents no conflict between the ruling of the Sixth Circuit and existing Federal Circuit jurisprudence.

B. There Is No Authority Requiring a District Court to Undertake a Patent Claim Construction Analysis in a Product Configuration Trade Dress Case Before Making a Finding of Functionality.

The test to determine whether a product configuration is *de jure*[5] functional includes:

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[5] "*De jure* functionality means that the product has a particular shape 'because it works better in this shape.'" *Valu Engineering, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274 (Fed. Cir. 2002) (*quoting In re R.M. Smith, Inc.*, 734 F.2d 1482, 1484 (Fed. Cir. 1984)). Unlike *de facto* functional features which may be entitled to trademark protection, *de jure* functional features are not. *Id. See also Black & Decker, Inc. v. Hoover Serv. Ctr.*, 886 F.2d 1285, 1291 (Fed. Cir. 1989).

> (1) the existence of a utility patent disclosing the utilitarian advantages of the design; (2) advertising materials in which the originator of the design touts the design's utilitarian advantages; (3) the availability to competitors of functionally equivalent designs; and (4) facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product.

Valu Engineering, 278 F.3d at 1274 (*citing Morton-Norwich*, 671 F.2d at 1340-41). As set forth above, a utility patent is simply one factor to be considered when evaluating functionality in a trade dress case. As noted by the Sixth Circuit, the district court considered evidence relating to all four *Morton-Norwich* factors. (Pet. App. 15)

There is no logical or legal need, or requirement, under *TrafFix* or Federal Circuit precedent for a rigorous application of patent claim construction standards and procedures in trade dress disputes. Unlike the situation in a patent infringement case, interpreting and applying a patent claim is not the sole basis for assessing functionality in the context of a trade dress infringement case. *See Morton-Norwich*, 671 F.2d at 1340-41.

In a trade dress case, functionality is a factual inquiry which includes consideration of relevant utility patents, not merely the claims, along with other non-patent evidence. *Morton-Norwich*, 671 F.2d 1332. Due to the important public notice function of patent claims, claim interpretation in a patent infringement case is a pure question of law based primarily on intrinsic evidence. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370, 116 S. Ct. 1384 (1996). This serves to reinforce the lack of a need or requirement for a rigorous application of patent claim

construction standards and procedures in trade dress disputes. Also unlike a patent case, a plaintiff in a trade dress infringement case is entitled to prove non-functionality of disputed trade dress even if the trade dress feature is found in a patent claim either literally or by equivalents. *TrafFix*, 532 U.S. at 29.

Petitioner argues that the Sixth Circuit has upset the balance struck by *TrafFix* in how patent evidence is to be considered when the product feature is claimed in a patent versus when the product feature is mentioned but not claimed. (Pet. for Cert. 12) However, nothing in the Sixth Circuit's opinion discusses such a distinction and Petitioner fails to cite to any specific statement which upsets this "balance." The Sixth Circuit stated:

> The patents in this case were probative evidence, *see* Fed. R. Evid. 401, and *the district court, as the trier of fact, could credit or discount the patent evidence* by considering the likelihood that various features of the trademarked designs were claimed in any of the patents.

(Pet. App. 25) (emphasis added)

Petitioner never asked the district court to perform a formal claim construction nor did Petitioner ever put forth its own claim construction. Without a request or competing claim constructions from the parties, the court was well within its discretion to read the claims and ascertain their plain meaning, as well as to consider other statements in the relevant patents, as they related to the functionality of the disputed leg designs. There is no conflict between the existing law and the holding in this case.

C. No Conflict of Authority Has Resulted From the Sixth Circuit's Review For Clear Error the Totality of the Evidence of Functionality and Affirming the District Court.

The Sixth Circuit did not make any holdings in this product configuration trade dress case that diverged from weighing the totality of the evidence under the *Morton-Norwich* factors regarding functionality under the clear error standard of review. As previously set forth, Petitioner's Questions Presented 2 and 3 are predicated on false premises.

Contrary to Petitioner's assertions, a reading of the opinions below shows that both the trial court and the Sixth Circuit looked to more than just the patent drawings of the utility patents, and in fact considered all of the ornamentality evidence. This is wholly consistent with *Morton-Norwich*, and consistent with Petitioner's own assertion that courts are to consider evidence of ornamentality in the context of a functionality determination. Petitioner again offers only conclusory arguments that the Sixth Circuit has diverged from an existing law, but then fails to identify any holding or result established in this case by the Sixth Circuit, or by the district court, where new law has been made with respect to a finding of functionality.

IV. THE SIXTH CIRCUIT CONSIDERED THE TOTALITY OF THE EVIDENCE UNDER THE APPROPRIATE CLEAR ERROR STANDARD WHEN REVIEWING THE DISTRICT COURT'S FINDING OF FUNCTIONALITY.

Petitioner devotes a substantial portion of its argument, including the last two pages of its Petition, to rearguing the record evidence of functionality. Petitioner maintains the Sixth Circuit's consideration of evidence of functionality, other than the utility patents, was without substance. This discussion seems to have little to do with any of the Questions Presented. In any event, Petitioner is incorrect.

The record below is replete with evidence of functionality, and the Sixth Circuit properly recognized that functionality is a question of fact reviewed for clear error. (Pet. App. 6-7, 13, 19-20); *see also Ferrari S.P.A. Esercizio Fabriche Automobile E. Corse v. Roberts,* 944 F.2d 1235, 1246 (6th Cir. 1991); *Market Masters, Inc. v. Clinician's Choice Dental Prods.,* 99 Fed. Appx. 677, 682 (6th Cir. 2004).

A. Petitioner's Patents Disclosing the Utilitarian Advantages of the Curved Line Guide Leg Designs.

The district court and the Sixth Circuit discussed the evidence of Petitioner's preexisting utility patents that described the advantages of the curved line guide leg designs.

Petitioner's inventor, Mr. R. Ohmura, initially sought utility patent protection for the curved leg designs in the U.S. and several foreign jurisdictions.[6] Between 1972 and

[6] At trial, Respondents offered into evidence certain foreign patents owned by Petitioner that included numerous statements and

(Continued on following page)

1980, Petitioner obtained utility patents that set forth statements and descriptions regarding the disputed leg designs. (JA 1823, 1827, 1666, 1718) Contained in the utility patents are Petitioner's admissions of the functional nature of its leg designs. While these admissions were set forth in more detail at the district court, a small subset of Petitioner's admissions in its patents include the following:

(i) twisting the legs of its line guides increases the mechanical strength of the guide ('504 patent, JA 1827; *see also* U.S. Patent Number 4,176,488 ('488), JA 1823; JA 2277-81, 2283);

(ii) the legs of its line guides are bent (i.e., curved) and twisted "to cope with a force applied horizontally by a fishing line, and not to apply an impact force directly to the fixing ring . . . [a] main characteristic feature of the present invention lies in that the rear supporting legs are . . . inwardly twisted by 90 degrees." (JA 1825);

(iii) "the support legs are twisted toward the guide ring, and hence, have an effect in smoothly directing the line toward the guide ring" to avoid line entanglement (JA 1825);

(iv) "the legs . . . shield the [ring structure] against impacts during use of the rod" (JA 1827) ("the resulting impact is received and

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admissions regarding the functionality of the same curved leg line guide designs at issue in this case. During trial, the district court reserved ruling on the admissibility of the foreign patents, but later ruled in its Memorandum Opinion that they were inadmissible. The foreign patents offered into evidence by Respondents included Petitioner's Japanese and Great Britain patents. (JA 2211, 2212, 2213, 2215, 2145, 2151, 2199, 2208, 2202, 2205)

absorbed by the bifurcated legs . . . which are per se resilient."); (*see also* JA 1823); and

(v) regarding low production costs, Petitioner's patents state that its line guides are "integrally formed by stamping and bending a piece of sheet metal" and are manufactured "in quite an economical manner requiring a very few number of processing steps." (U.S. Patent Number 3,780,684 ('684), JA 1718; '027 patent, JA 1666; *see also* JA 660, 675)

The evidence before the district court established that Petitioner's utility patents disclosed utilitarian advantages of the curved leg design, i.e., the weight of the evidence showed that the line guide leg designs were not arbitrary and served a useful purpose. The first *Morton-Norwich* factor was therefore met. 671 F.2d at 1340.

B. Petitioner's Advertising Materials Touting the Utilitarian Advantages of the Line Guide Leg Designs.

As discussed at length by the district court and the Sixth Circuit, Petitioner's own advertisements and public statements concede and, in fact, tout the functionality of the disputed leg designs both directly and through references to the utility patents described above, as well as to other patents, applying to these designs. (JA 58-9, 66-7, 75, 103; 293, 660, 666, 675, 1841)

- Petitioner distributed a "V" Frame Victory Design advertisement promoting the curved leg designs of the LV and SV guides from 1982 through the mid-1990s. In that advertisement, Petitioner highlighted and distinguished the curvature of the legs of

the LV and SV designs from their straight-leg predecessors and promoted the functional improvements of the line guide designs, such as their "superlightness and strength," flexibility, reduced air resistance and reduced bulk. (JA 662)

- Petitioner's other advertising described the curved legs of the LV and SV of the frames as an "arched V-frame" or "high V frame," asserted that these frames are stronger frames, and for this and other reasons a "much better buy" for consumers and "strong yet flexible." (JA 531; JA 703, 555, 561, 564-92, 679-85, 690, 692, 704, 708, 711, 713, 715, 717, 743, 744, 759, 761, 763, 765-82, 789)

- The N guide with its concave curved leg design (also found on the LR design) similarly was promoted as having a brand new look in guide construction with a unique one piece three-legged design. (JA 77, 677-78) That design was promoted as providing greater strength and flexibility than competitors' designs. (JA 616-17)

- From its initial introduction, Petitioner's advertising for the LR design touted that design as "light, strong, [and] flexible." (JA 674) Subsequent advertising promoted the LR's flexibility and shock absorbing capabilities including graphics about the benefits of the legs. (JA 672)

As the district court held, Petitioner's advertising and public statements also repeatedly asserted the functionality of the disputed leg designs by references to the applicability of the '027, '684, '488 and '504 utility patents, as well as other patents to those designs.

- In its "V-Frame Models" advertisement for the LV and SV line guides, Petitioner referenced the '027 utility patent as applying to these designs. (JA 670, 675) In other advertising for those guides in catalogs from 1982 through at least 2002, Petitioner repeatedly listed the LV and SV designs as subject to a "Patented V-Frame Design." (JA 293)

- In correspondence with competitors and distributors regarding the manufacture or marketing of guides purportedly similar in appearance to the LV, SV and N guides, Petitioner cautioned that theses guides were subject to the '027 patent. (JA 1898, 2090-92)

- In advertising for the N and LR designs, Petitioner specifically referenced the '488, '504 and '027 utility patents as well as other patents. (JA 675). In other advertising, Petitioner touted the LR model's "new shock absorbing frame pat. construction." (JA 672)

Based upon the substantial record evidence before it, including those exhibits offered and admitted into evidence by Petitioner, the district court properly found that "Fuji's advertisements refer to the strength of its line guides for which the curved legs are essential." (Pet. App. 97) Those features in the words of Petitioner's advertisements and other public statements clearly evidence Petitioner's belief that the disputed leg designs affect the quality of those guides. (*Id.*; JA 674; *see also* JA 123, 125, 127, 130-31, 139)

C. No Suitable Alternative Designs to Petitioner's Curved Line Guide Legs.

The third *Morton-Norwich* factor is "the availability to competitors of functionally equivalent design." 671 F.2d at 1341. The district court found that both the industry and consumers recognize the functional nature of Petitioner's disputed leg designs. The court found that "Fuji's line guides at issue are considered the industry standard and are associated with particular fishing applications." (JA 47-8, 78) The district court also found that the guides with the disputed leg designs are the "most popular guide styles in the U.S." (JA 44, 79, 2342-43) The court further found that "the functional superiority of the curved legs are [sic] in all likelihood why purchasers prefer Fuji." (Pet. App. 98) The record is replete with evidence supporting the court's findings.

The district court found that customers are very particular in their choice of line guides for particular types of fishing. (JA 79, 2336, 2350, 2342-43, 2325, 2245-46) Customers consider the guide shape in the context of the fishing application – e.g., fly fishing versus boat fishing. (JA 48, 2352-53, 2343) Resellers, including rod manufacturers and custom rod assemblers, select line guides based on consumer preferences for certain guides for different types of fishing. (JA 78, 2336, 2343, 2245-46)

The district court found the Petitioner's line guides, each with curved legs, are used for different types of fishing. (JA 44, 48) For example, the LV guide is a spinning guide; the N guide is a casting guide; and the LR guide is a boat guide. (JA 48, 288-301) In addition to Petitioner's advertising and public statements promoting the disputed leg designs for those particular fishing

applications, Petitioner's resellers, rod manufacturers and custom rod assemblers also promoted the functionality of the disputed leg designs including, for example, the concave V frames and the strength and flexibility of the LV, SV and N guides. (JA 77, *citing* JA 677, 688, 695, 703, 555, 561, 564-92, 679-85, 690, 692, 704, 708, 711, 713, 715, 717, 743, 744, 759, 761, 763, 765-82, 789)

The district court's Memorandum Opinion gives an example of that promotion. "According to Fuji's proof, industry publications recognize Fuji as a leader in rod components." (Pet. App. 67) As the district court specifically sets forth:

> In 1976, the *Rodcrafter Journal* reported that the Lew Childre had discontinued one of Fuji's 'famous' line guide models and "[i]n its place . . . proudly introduced the new Fuji model NHG. Dramatically different in design, it combines strength at no increase to weight . . . greater strength is provided by the curved (the famous arch) rather than straight-leg bracing. The guide, as is true of all Fuji models, is of one piece, thereby eliminating any possible weak connections."

(Pet. App. 67, 97-8, *see also* JA 801, 799) That article expressly states that the new curved legs were stronger than the old straight legs, and also provided a side-by-side comparison of the straight versus curved legs. The article stated: "[t]he new slim profile frames are every bit as significant an improvement as are the ceramics. The two braces to the side of the ring form a concave V (stronger than a straight V) while the center brace forms the other foot." (JA 805)

The district court concluded that "market acceptance of new alternatives for the Petitioner's designs would be difficult." (Pet. App. 68) Since customers have come to expect certain guide designs for use in certain types of fishing applications, manufacturers and rod builders would be very reluctant to switch to new designs for these applications. Industry testimony was that not only would it be difficult to introduce an alternative design within any reasonable time period, but also such alternative designs would likely be perceived as unsuitable for certain applications by customers. (JA 2343-44, 2323)

D. Petitioner's Design Results in a Comparatively Simple or Cheap Method of Manufacturing the Line Guide.

Petitioner's utility patents provide admissions that its designs result in a comparatively simple or cheap method of manufacture of the disputed line guide designs. (JA 1666, 1718) Specifically, the district court found:

> Fuji's statements in its utility patent papers refer to the strength of the curved legs, the ability of the curved legs to reduce line entanglement, and the ability to manufacture 'in a quite simple manner' line guides more efficiently without other processes. The latter factor clearly impacts costs of production . . .
>
> From these facts, the Court concludes that the legs are essentially functional and the added efficiencies from the use of the curved legs impacts the cost of producing the line guide.

(Pet. App. 97-98)

The district court found that the leg shapes of Petitioner's line guides contributed to the cost savings of the invention disclosed in the '027 patent and the '684 patent. Both the '027 patent and the '684 patent state that one object of the invention is to provide a method for producing the line guide in "an economical manner" (JA 1666, 1718), and that the "device can be economically manufactured on a mass production scale." *Id.* This supports a finding of functionality against all of the designs. (JA 1666, 660, 675; *see also* JA 1898, 126-27)

Finally, Petitioner's own witness acknowledged that the shape of the legs can affect manufacturing costs, and that the Petitioner's stamping process not only makes the guide stronger but is also more cost effective. (JA 2246-47) Based on the record evidence, the district court correctly found that the leg designs of the line guides impact the cost of production.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

*HUGH F. BANGASSER
THERESA KEYES
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 4th Avenue Suite 2900
Seattle, WA 98104
Telephone: (206) 370-7607
Facsimile: (206) 623-7022

Attorneys for Respondent
Pacific Bay International, Inc.

*MARK J. PATTERSON
EMILY A. SHOUSE
WADDEY & PATTERSON
1600 Division Street, Suite 500
Nashville, TN 37203
Telephone: (615) 242-2400
Facsimile: (615) 242-2221

Attorneys for Respondent
Batson Enterprises, Inc.

*KENT E. KRAUSE
BREWER, KRAUSE, BROOKS, CHASTAIN & BURROW
611 Commerce Street, Suite 2600
P. O. Box 23890
Nashville, TN 37202
Telephone: (615) 256-8787
Facsimile: (615) 256-8985

Attorneys for Respondent
Amtak Limited d/b/a American Tackle Limited

**Counsel of Record*